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No. 09-1195

Supreme Court, U.S.
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In The

Supreme Court of the United States

MELISSA HARMAN AND JUSTIN OVERTON,

Petitioners,

vs.

BRENT POLLOCK, Officer, Department of Public Safety, State Bureau of Investigations, Salt Lake City, Utah; and SCOTT BARNETT, Officer, Department of Public Safety, State Bureau of Investigations, Salt Lake City, Utah,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Police officers secured a warrant authorizing the search of a house and its detached garage. Upon entering the garage, police saw marijuana in plain view, some indicia of a living quarters, and Petitioner Harman – whose name was on the gas bill for the residence – sleeping with Petitioner Overton on a mattress on the floor.

The question presented is:

Where officers testified that occupants of drug houses often use out buildings as "crash pads," did the circuit court properly apply *Maryland v. Garrison*, 480 U.S. 79 (1987), to the "unique facts of this case" in holding that, until the officers completed their questioning of all suspects, they "reasonably believed that the [Petitioners] were connected to the illegal activity at the main residence"?

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Respondents, Brent Pollock and Scott Barnett, submit this brief in opposition to a writ of certiorari to review the published opinion of the Tenth Circuit Court of Appeals in this case, *Harman v. Pollock*, 586 F.3d 1254 (10th Cir. 2009).

JURISDICTION

The Tenth Circuit issued its opinion on November 18, 2009, and denied rehearing on December 30, 2009. The petition for a writ of certiorari was timely filed on March 29, 2010.

STATEMENT OF THE CASE

Historical Facts. At approximately 12:45 a.m. on February 12, 2003, SWAT officers not named in this lawsuit simultaneously entered the house and the detached garage at 44 West 2700 South, South Salt Lake City, Utah.[1] Appellant's Appendix below (Aplt. App.) at 430. Respondent Barnett accompanied the officers who entered the house. Because Respondent Pollock had worked undercover during the investigation, he wore a mask over his face and waited on the edge of the property until all occupants

[1] Regarding the narcotics investigation and the procuring of the warrant, Respondents incorporate by reference the statement of facts in the opinion below, and include here the facts regarding the execution of the warrant.

of the premises were secured and escorted to the detention van, which was parked in front of the property. Aplt. App. 349. It took approximately fifteen minutes for SWAT officers to secure the house and garage. Aplt. App. 378.

When the SWAT officers entered the garage, they found Petitioners Melissa Harman and Justin Overton sleeping on a mattress. Aplt. App. 435, 442. They also observed marijuana and a pipe in plain view on the kitchen counter. Aplt. App. 449, 452. The garage was furnished with a kitchenette, a couch, a television, and a separate room with a mattress on the floor. Aplt. App. 430. Officers escorted Petitioners to the containment van, where the house occupants had also been taken. Aplt. App. 349, 387.

SWAT officers relayed to Respondent Pollock that Petitioner Harman had been found in the garage. Upon hearing this, Respondent Pollock remembered Petitioner Harman's name as the person listed on the gas account at 44 West 2700 South and suspected that she was using the garage as a temporary "crash pad." Aplt. App. 365. As Respondent Pollock later explained in deposition, an outbuilding, separate from the main residence, is often used by drug users and traffickers as a "crash pad" to store, use, and manufacture drugs, and these buildings commonly have sinks, stoves, beds or cots, or other personal items. Aplt. App. 377, 417, 432, 453. With all occupants safely secured in the detainment van, Respondent Pollock then entered the garage and seized the marijuana and pipe on the counter. Aplt.

App. 350. He also performed a cursory walk-through of the garage to check for other drugs or weapons. *Id.*

Meanwhile, Respondent Barnett was in the detainment van, interviewing the occupants found in the house and garage. He first interviewed Petitioners, whom he suspected were involved in the drug trafficking at the house. Aplt. App. 412. When asked about the marijuana found in the garage and their association with the house occupants, Petitioners claimed they did not know the house occupants and were not involved in any way with drug trafficking. Aplt. App. 414. Respondent Barnett next interviewed the house occupants, who then confirmed that Petitioners were not involved in drug trafficking or otherwise connected to the house. Aplt. App. 407. After confirming the Petitioners' claim with the house occupants, Barnett advised the scene commander that Petitioners did not appear to be connected to the house and recommended releasing them on a citation for possession of the marijuana and pipe found in the garage. Aplt. App. 406, 473. Only a few minutes lapsed from the time Respondent Barnett verified Petitioners' story to the time he asked the scene commander to cite and release them. Aplt. App. 457-58, 476.

The scene commander agreed with Respondent Barnett's recommendation, cited Petitioners at 2:35 a.m., removed their handcuffs, and released them. Aplt. App. 457-58, 473, 476. Officers remained at the house until approximately 3:30 a.m. to finish searching the house and processing the remaining

suspects. Aplt. App. 410-11. Aside from answering a brief question about the warrant following Petitioners' release, Respondent Barnett had no further interaction with Petitioners that night. Aplt. App. 370, 408-09.

When Respondent Pollock searched the garage, he believed it was accessible to and under the control of the occupants of the house, that Petitioners resided in the house, and that they were using the garage as a "crash pad" to use and store drugs away from the main house. Aplt. App. 372. Respondent Pollock did not interview, question, or detain Petitioners in any way that evening. Aplt. App. 370. Respondent Barnett never searched the garage. Aplt. App. 372. And until Respondent Barnett finished interviewing all the occupants on the property, neither he nor Respondent Pollock knew that Petitioners used the garage as a separate residence that was not associated with the drug trafficking in the house. Pet. App. 15a; Aplt. App. 414.

Court of Appeals Decision. Reviewing the undisputed historical facts, the court of appeals affirmed the district court's grant of qualified immunity, but for different reasons than the district court. The court of appeals concluded that, based on the undisputed historical facts, Respondents did not know, nor should they have reasonably known, that the detached garage was a separate residence until they learned this fact through the on-scene interviews. Given the uncertainties whether the garage was in fact a separate residence, and that a

reasonable officer could infer that the garage was a "crash pad" being used by the occupants of the main house, the circuit court concluded that Respondents acted reasonably in continuing the search and detention until the interviews were completed and therefore no constitutional violation occurred.

Petitioners' appendix (Pet. App. 25a) omits the final paragraph from footnote 4 of the circuit court's opinion containing a critical portion of the court's *Garrison* analysis:

> But the SERT officers also saw marijuana in plain view, were familiar with crash pad type living situations, and soon learned that Melissa Harman was a resident whose name also appeared on the Questar gas bill for the main house, all of which suggested the quarters may have been part of the main house or its operations as well. Given these considerations and the latitude we afford officers and their expertise, it falls squarely within the *Garrison* directive to allow the officers a reasonable amount of time to confirm that the apartment-cum-reconfigured-detached-garage was "erroneously included within the terms of the warrant." *Garrison*, 480 U.S. at 87.

586 F.3d 1254 at 1264 n.4.

REASON TO DENY THE PETITION

The circuit court's decision does not conflict with *Maryland v. Garrison*, 480 U.S. 79 (1987), or the decisions of any circuit court

The circuit court's decision does not conflict with *Garrison*. Instead, it properly applies *Garrison* to the unique facts of this case. *Garrison* required the officers here to discontinue the search "as soon as they discovered that there were two *separate* units." 480 U.S. at 87 (emphasis added). Petitioners mistakenly argue that the *separateness* of the garage as a distinct residence was unequivocally and instantly obvious. It was not. That the garage appeared to be some sort of living quarters is undisputed, but – given "the objective facts available to the officers at the time" – the officers reasonably believed that the occupants of the main house controlled the garage and used it as a crash pad. *Garrison*, 480 U.S. at 88. As the circuit court noted, critical and undisputed facts reasonably suggested to the officers that the garage "may have been part of the main house or its operations as well." 586 F.3d at 1264. These undisputed facts included:

- city records show the property was zoned for only one single family residence (Aplt. App. 333, 465);
- the warrant listed the detached garage in the description of the place to be searched and authorized the search of any and all outbuildings and curtilage of the property (Pet. App. 3a; Aplt. App. 400, 402);

- Harman was found sleeping in the garage of that property with illegal drugs, confirming Pollock's suspicions that the garage was being used as a "crash pad" to store and use drugs (Aplt. App. 364-65);

- Harman was paying the gas bill at the main house, which was a demonstrable connection to the main house suggesting that the garage was not a distinct residence (Pet. App. 23a; Aplt. App. 365);

- there was no separate numbering or lettering on the garage to indicate that the garage was a separate residence (Aplt. App. 372, 436); and

- the officers were familiar with "crash pad" living situations, in which drug users and traffickers commonly use an outbuilding, separate from their main residence to store, use, and manufacture drugs, and that these buildings commonly have sinks, stoves, beds or cots, or other personal items; the officers frequently find "crash pads" when executing narcotics search warrants on suspected drug dealers (Aplt. App. 377, 417, 432, 453).

This undisputed evidence "suggested no distinction" between the main residence and the garage. *Garrison*, 480 U.S. at 88. Respondents acted reasonably in continuing the search and detention until new evidence obtained from interviewing the occupants revealed that the garage was in fact a

separate residence. In considering these undisputed facts, the circuit court did not improperly weigh facts or make credibility determinations, but looked, as *Garrison* directs, to all of the information available to the officers "as the search proceeded." 480 U.S. at 87. Only after the interviews were finished did the officers discover that the garage was a *separate* residence. Pet. App. 15a; Aplt. App. 414.

The circuit court held that until the officers completed questioning all of the occupants, the evidence, "taken together, . . . establishe[d] that the Officers reasonably believed that the [Petitioners] were connected to the illegal activity at the main residence." *Harman*, 586 F.3d at 1266. This holding does not impose a new standard, as argued by Petitioners, but simply applies *Garrison*'s "knew or reasonably should have known" standard to the unique facts of this case. The circuit court explicitly limited its holding to the "narrow confines of this case." 586 F.3d at 1267. The decision in no way suggests that police officers have "unbridled discretion to rummage at will through a person's effects," *Arizona v. Gant*, 129 S. Ct. 1710, 1720 (2009), but comports with both the spirit and the letter of *Garrison* by reaffirming the "knew or reasonably should have known" standard.

The circuit court's decision does not conflict with the decisions of other circuit courts, as claimed by Petitioners. The officers in those cases continued to search after the warrant's overbreadth became apparent. *See U.S. v. Ricciardelli*, 998 F.2d 8, 12-13

(1st Cir. 1993) (striking down anticipatory warrant for lack of definiteness); *U.S. v. Ritter*, 416 F.3d 256, 267-68 (3rd Cir. 2005) (remanding for further fact-finding to determine whether suppressed evidence was discovered before or after officers discovered multiple living units erroneously included in warrant); *Mazuz v. Maryland*, 442 F.3d 217, 228 (4th Cir. 2006) (no dispute as to when officer realized he was in wrong apartment); *Simmons v. City of Paris*, 378 F.3d 476, 480-81 (5th Cir. 2004) (no dispute as to when officers knew they had entered wrong residence); *Pray v. City of Sandusky*, 49 F.3d 1154, 1160 (6th Cir. 1995) (no dispute as to when officers knew they had entered wrong suite of duplex); *Jacobs v. City of Chicago*, 215 F.3d 758, 769 (7th Cir. 2000) (search invalid because it occurred, according to allegations in complaint, after a reasonable officer would have discovered that warrant was defective); *U.S. v. Schroeder*, 129 F.3d 439, 443 (8th Cir. 1997) (search improper where it was "abundantly apparent" to officers that they were searching wrong property); *Mena v. City of Simi Valley*, 226 F.3d 1031, 1039 (9th Cir. 2000) (search improper where there was "virtually no evidence" that suspect had control over locked rooms of other residents); *U.S. v. Cannon*, 264 F.3d 875, 879 (9th Cir. 2001) (separate warrant required where outbuilding was "clearly a separate dwelling"); *Liston v. Co. of Riverside*, 120 F.3d 965, 977 (9th Cir. 1997) ("sharply conflicting accounts" of length of detention precluded summary judgment); and *Peterson v. Jensen*, 371 F.3d 1199 (10th Cir. 2004) (unequivocally apparent to officers that the suspects

described in the warrant had moved out of the home and new residents had moved in). In contrast, the officers in this case terminated their search as soon as the interviews revealed that the garage was a separate residence.

Nor does the circuit court's decision conflict with its prior decision in *Harman v. Pollock*, 446 F.3d 1069 (10th Cir. 2006). In that decision, the circuit court held that, based on the facts known to the officers, the warrant properly included both the house and the garage. The circuit court remanded to the district court for further factual findings regarding exactly what transpired after the officers entered the garage. 446 F.3d at 1081-82. That decision did not limit the decision here or the application of *Garrison* to the facts produced in additional discovery.

CONCLUSION

The petition for a writ of certiorari should be denied because the circuit court's decision does not conflict with *Garrison* or the decisions of any of the circuit courts and is of limited precedential value because its holding is closely tied to the unique facts of this case.

Respectfully submitted,

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